VARNUM
RIDDERING SCHMIDT HOWLETT LLP
ATTORNEYS AT LAW

251 NORTH ROSE STREET • FOURTH FLOOR
KALAMAZOO, MICHIGAN 49007-3823

TELEPHONE 269 / 382-2300 • FAX 269 / 382-2382 • WWW.VARNUMLAW.COM

JOHN W. ALLEN
BOARD CERTIFIED CIVIL TRIAL ADVOCATE
ADMITTED IN ILLINOIS, INDIANA, MICHIGAN, MINNESOTA, WISCONSIN AND FLORIDA

DIRECT DIAL 269/553-3501
E-MAIL jwallen@varnumlaw.com

May 24, 2005

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Email: MSC_Clerk@courts.mi.gov

Re: Comments and Proposals relating to:

PROPOSALS TO AMEND THE MRPC (ADM File No. 2003-62).

To The Michigan Supreme Court:

I am a partner with Varnum Riddering Schmidt & Howlett LLP, and acknowledge the thoughtful contributions of our partners, Elizabeth Jamieson and Terry Bacon. Currently, I serve as Chair of the State Bar of Michigan Special Committee on Grievance, and, in the past, have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee"). I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section through the ABA Ethics 2000 process. This letter contains the views of this Firm, not those of the State Bar of Michigan, the ABA, nor their Committees.

The following are submitted as Comments, and as further amendments, to the above proposals, to be considered with ADM File No. 2003-62.

1. Conflict consents should NOT be required to be "confirmed in writing."

Our Proposal: Delete the proposed "confirmed in writing" requirement from proposed MRPC 1.0(b), 1.7 (b), 1.9 (b), 1.10(d), 1.11(a), 1.12, and 1.18(d).

The Court's proposal adds a "confirmed in writing" requirement to Rules 1.0(b), 1.7(b), 1.9(b), 1.10(d), 1.11(a), 1.12, and 1.18(d). This will add a burdensome and sometimes impractical requirement of written disclosure, which will increase expense and exposure to civil liability. The purpose is not to assist the person (sometimes a client, and sometimes a third-

party) in making the waiver/consent decision, because, by the very terms of the proposal, the "writing" is not required until **after** that decision is made. It is simply a new requirement to create an exhibit.

While this may be a good practice, it is likely to be used for mischief. A lawyer's failure to provide a writing will be a *per se* violation, even if the client admits waiver and consent, and is not damaged. MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (actual consent, no injury) affect only punishment, not culpability. See *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972), and ADM File No. 2002-29 Proposed Standards 4.4 (Alternative A Strike Outs) and 9.32.

Civil liability could also result. "After-the-fact" attacks on waivers could be used to avoid otherwise valid and fair fees due to the lawyer, even when the client admits waiver and consent, and is not damaged, simply to avoid payment.

Other states have already reached this conclusion.

- Pennsylvania has rejected the "confirmed in writing" requirement.
- Likewise, the Illinois Joint ISBA/CBA Committee Ethics 2000 Final Report (October 17, 2003) states:

"Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. The need for a consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question whether consent was given. **Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing--when it may be entirely clear that the consent was in fact given--is not reasonable.** Accordingly, the Committee recommends that the rule and comments be revised to eliminate the requirement that conflict waivers be in writing."

2. <u>The "informed consent" requirement is not sufficiently defined, and should not require a lawyer to give advice to a person who is not a client.</u>

Our Proposal: Delete the proposed "informed consent" requirement from proposed MRPC 1.0(e)[definition], plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b).

The "confirmed in writing" requirement is made even more perilous by the Court's Proposal to add a new "informed consent" requirement in twelve (12) rules [1.0(e)[definition], plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b)].). While superficially benign, and even politically attractive in its sound, the term "informed" is not defined *["reasonably adequate under the circumstances*"], even though it must include an *explanation "about the material risks… and reasonably available alternatives*." It is unclear whether ABA Rule 1.0 Comment 6 [which considers important factors such as whether the person is "experienced in legal matters generally," or "represented by independent counsel."] will be construed as part of the Rule. (See Part 4, below.)

In addition, in some instances [e.g., Proposed Rules 1.9(a) and (b), 1.12(a) and 1.18(d)(a)], the proposal creates a new duty of disclosure to a **non**-client third party to whom the lawyer will be required to give "advice." This is an unprecedented expansion of the lawyer's duties to persons not party to any lawyer-client contract.

Lawyers will not know in advance how to conform their conduct to the requirement of the law. According to the Comment, *"A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person **assumes the risk** that the client is inadequately informed and the **consent is invalid**."* There is no clear "materiality" limitation, and no definition of what is "material" in any specific context. The omission of any fact from the proposed "informed consent" disclosure will void the consent. To be valid, "informed consent" disclosures will look like SEC proxy statements…and still always be subject to attack, after the fact. **This is an undefined "negligence" in a strict liability code.**

This will invite challenges to the validity of any consent, after reliance upon the consent, based on some alleged "omission of fact" from the "informed consent" disclosure. Abuse is likely, especially in the context of civil proceedings for fee collection, malpractice, and other civil liability claims by non-client third parties.

The current state of the law is sufficient on this point. There is no empirical evidence to the contrary. The "informed consent" requirement should be rejected.

3. <u>MRPC should not be a platform for civil liability.</u>

Our Proposal: Retain the current Rule 1.0(b) which says, "*The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by a failure to comply with an obligation or prohibition imposed by a rule.*"

The court's proposal deletes this declarative admonition, substituting a precatory statement. Instead, the proposed Preamble, Scope [20] says**, "Violation of a Rule *should* not itself give rise to a cause of action against a lawyer nor *should* it create any presumption in such a case that a legal duty has been breached."**

Amendments must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, (either directly or indirectly) as a platform for malpractice claims. *Cf., Beattie v. Firnschild,* 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, §52. In the 21st century, Michigan lawyers are far more likely to encounter the MRPC in a civil, rather than disciplinary, context.

The Proposed Rule 1.0 deletes the admonition that MRPC are not intended to create a civil cause of action. Proposed MRPC, Preamble, Scope [20], confirms that ". . . the Rules do establish standard of conduct . . ." and ". . . violation of a Rule may be evidence of breach of the applicable standard of conduct." Even now and with that admonition, the MPRC are used to define the "standard of care" for lawyers in civil lawyer professional liability cases. Any change to MRPC has the potential to increase civil claims, and also to create new ones which do not now exist.

Thus, there is legitimate concern that changes to terms such as "should' or "reasonable" in the Model Rules will make it even more difficult to obtain summary disposition or summary judgment based on the lawyer's proven conformity with the Rules' requirements. If the Model Rules are changed to a "reasonable lawyer" standard, the question of what a "reasonable" lawyer would (or should) have done will become a jury question, virtually eliminating summary disposition and summary judgment, and automatically vesting any such claim with some value. This is a radical, and unwarranted, change from current law.

Such a change will complicate the lawyer's defense of "aiding and abetting" and of other claims in which the plaintiff admits (or it is uncontroverted) that the lawyer did not "know" of the client's wrongdoing, but the plaintiff (usually after the fact) alleges that a "reasonable lawyer" would (or should) have figured it out from what the lawyer did know, or "should have known."

This is not merely theoretical, nor minor. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also those Attorney Grievance Commission (AGC) complaints, and Attorney Discipline Board (ADB) proceedings, which, at base, are really civil claims for negligence. It will increase the cost of those proceedings and thus the Bar dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

4. <u>The role of the MRPC Comments should be clarified.</u>

Our Proposal: Either:

- **add a Provision which states explicitly that the Comments are not authoritative, and delete the Comments from the proposed MRPC; OR,**
- **include the authoritative provisions of the Comments in the text of the MRPC.**

This will affect virtually all of the Court's proposed changes. In the Court's proposals, the Comments are extensively relied upon to give meaning to the Rule, even though that has not been their function; in Michigan, the Comments to MRPC are not, and never have been, the law.

> **"This court allows publication of the comments only as 'an aid to the reader,' but they are not 'authoritative statement[s].'** The rules are the only authority**."** *Grievance Administrator v Deutch,* 455 Mich 149, 164, 565 NW2d 369 (1997). (Emphasis added.)

Even the Court's proposed MRPC take the same position at Preamble, Scope, Comment [21]:

> "The Preamble and this note on Scope are only intended to provide general orientation and are not to be interpreted as Rules. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." (Emphasis added.)

Therefore, little solace can be taken from what is in the Comments. This is especially significant, because in the ABA Ethics 200 process, the Comments were frequently used as vehicle for compromise. Important matters should be in the Rule. Otherwise, the material in the Comments in only misleading. If the Comments are not authoritative, they should be deleted.

5. <u>There should be a "transition provision," to provide for the addition of many new requirements.</u>

Our Proposal: Add a Transition Provision to proposed new Rule 1.0.2, Applicability of Rules, which states:

[New initial sentence] Rule 1.0.2, Applicability of Rules:

"All engagements existing as of the effective date of any amendments shall be controlled by the law in effect at the inception of the engagement, unless otherwise agreed by both the lawyer and the client."

There are several examples of the need for such a provision. For instance, the Court's proposed MRPC 1.7 would require, as of the effective date, each client in every multiple representation to have received a "written confirmation" of any conflict waiver/consent. For an estate planner with hundreds of husband-wife estate plans on file in continuing client relationships, this could mean thousands of written confirmations.

As another example, the present MRPC 2.2 (Intermediary) disappears; current intermediaries are left with no direction as to how to proceed. The deletion of MRPC 2.2 also diminishes the role of lawyers in amicably resolving disputes between clients.

These existing relationships should be allowed to continue, controlled by the law under which they were formed.

6. <u>Isolated Acts of Negligence should not be the subject to discipline.</u>

OUR PROPOSAL:

Add to Rule 1.1 a new Rule 1.1(d), as follows:

"(d) Disciplinary proceedings shall not be commenced based on other than knowing misconduct, or on negligent conduct, unless also based upon:

(1) A course of conduct; OR

(2) Negligence, combined with other factors, which taken in the aggregate, provide a basis for discipline."

MRPC is not the vehicle to cure lawyer incompetence or professional negligence. Too much of this has already crept into the Model Code of Professional Responsibility DR 6-101(a) in some Code jurisdictions, and into the Model Rules of Professional Conduct Rules 1.1 and 1.3. See also ADM File No. 2002-29, Proposed Standards 4.4 and 4.5 (Alts. A and B), and 5.13(c) (Alt. B).

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. While some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to remedy every lawyer error. Attempting to regulate lawyer competence with the MRPC, is like trying to teach driver education by using only speeding tickets. Lawyer competence is better addressed by training, continuing education, and specialized programs such as certification.

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and have not attempted to bring disciplinary proceedings based on isolated negligence, instead demanding: strong evidence of a course of conduct indicative of a refusal or inability to change; or, negligence combined with other factors (abandonment, non-feasance), which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Tellam, Bradley, *"Isolated Instances of Negligence as a Basis for Discipline,"* July, 2003, 149-152. When subjected to strict liability, quasi-criminal sanctions, citizens (including lawyers) should not be relegated to depending upon prosecutorial discretion, alone.

Our proposal would not likely result in any change in the current practices of AGC/ADB in most cases. But it would prevent abuses of prosecutorial discretion, as well as decrease the likelihood that the disciplinary process might be transformed into a ramp for civil liability actions.

7. The Court should clarify the ownership of lawyer files, and a client's rights to access to the information in those files.

OUR PROPOSAL: ADD a new provision to MRPC 1.4 (c), or a New Rule Concerning the State Bar, as follows:

[NEW] Rule 1.4 (c). Lawyer's Files and Records; Ownership and Copying.

(1) A lawyer's file is owned by the lawyer maintaining the file, including any document, film, tape or other paper or electronic media. A client has the right of access to information contained in a file relating to that client's representation.

(2) The lawyer is entitled to the original, physical material in the file, unless the client has a special need or a pre-existing proprietary right in the original.

(3) When necessary for full use of a document, the client's "access" may include at least temporary custody or non-destructive use of the original document, film, tape or other paper or electronic media.

(4) Unless specifically agreed or required by law, the client is not entitled to the lawyer's internal records, such as accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.

(5) The client is responsible to pay the cost of copying and delivering copies of the file records.

(6) A lawyer shall have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of

the representation file which belong to the client or for which the client has a need.

(7) Issues relating to file ownership and access, copy charges for information requests, and file destruction practices, may be described by the lawyer, and agreed by the client, in the terms of engagement or some other disclosure."

This proposal will conform the legal status of, and access to, a lawyer's files to that which is already legally recognized for the files of other Michigan professionals. It will correct earlier and erroneous Informal Ethics Opinions, and bring these issues into the "cyber" age, when the entirety of some client files may be found only on the lawyer's computer hard drive. For the rationale behind this and some other alternatives, see *"Who Owns the File and Who Pays for the Copies,"* Michigan Bar Journal (MBJ), August 2000, pp 1062 – 1065 (attached).

Subpart (6) is in accordance with Formal Opinion R-5. Sample policies may be found at *"Record Retention Overview,"* 74 MBJ 1196 (November, 1995); and Kerr, *"Creating a Record Retention Policy,"* 69 MBJ 684 (July, 1990).

AGC is frequently confronted with issues regarding access to information in lawyer's files. The intent of this proposal is to clarify the respective rights of both the client and the lawyer, and to provide specified guidance as to how to resolve these commonly encountered issues.

When considered by the Representative Assembly, this proposal was thought better to be included as part of the Rules Concerning the State Bar, which is an alternative equally effective in providing AGC, ADB, and all Michigan lawyers the much needed guidance on this very important issue.

8. **The Court should clarify the factors controlling a dispute between lawyer and client regarding the amount of the fee, in terms which will encourage, but not mandate, express fee agreements at the time of engagement.**

OUR PROPOSAL: ADD a new provision to MRPC 1.5(g) and (h):

[NEW] Rule 1.5(g) and (h):

"(g) Consideration of all Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or

lower than that which would result from application of only the time and rate factors.

(h) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through methods not in compliance with these Rules, prohibited by this Rule, or clearly excessive as defined by this Rule."

The sources for this proposal are: MCL 600.919; and the *Rules Regulating the Florida Bar*, Rule 4-1.5. The wording is taken from Florida Rule of Professional Conduct 4-1.5, where it has operated successfully and without adverse effect for several years. When adopted, the additional language should serve to reduce markedly the burden on disciplinary authorities and courts when fee disputes arise.

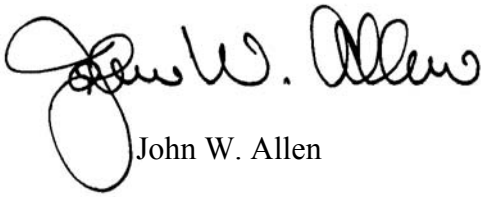
It is also already the law of Michigan, pursuant to MCL 600.919, which states that:

> The measure of compensation of members of the bar is left to the express or implied agreement of the parties, subject to the regulation of the supreme court.

The Amendment would also place a premium upon express fee agreements between lawyers and clients, without specifically requiring "written" agreements for every engagement. Thus, the amendment would encourage what is generally regarded as a good practice, but what many appropriately regard to be unsuitable and impractical as a mandatory rule for all engagements.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP



John W. Allen

Enclosure: *"Who Owns the File and Who Pays for the Copies,"* MBJ, August 2000, pp 1062 – 1065

#1125699

Ownership of Lawyer's Files About Client Representations Who Gets the "Original"? Who Pays for the Copies?

By *John W. Allen**

Who owns the file? Some well-intentioned, but incorrect, Michigan Informal Ethics Opinions previously told Michigan lawyers that the client (not the lawyer or law firm) owned all of the file, and, in most circumstances, was entitled to the original upon demand, with the copy and delivery costs paid by the lawyer. This not only failed to acknowledge the lack of any definitive Michigan law on the topic, but also was directly contrary to the analogous law applicable to the files and records of other Michigan professionals. In addition, it defied a certain practical consideration: In the modern cyber office, if the file is maintained only on a hard disk, is the client entitled to physical custody of the hard disk? In the year 2000, some parts of these earlier Informal Ethics Opinions no longer made sense.

In its newly issued Formal Ethics Opinion R-19 (8/4/2000) the State Bar of Michigan Board of Commissioners issued its first formal opinion of the new millennium, attempting to square up some past inaccuracies and encourage an interpretation of Michigan law and the Michigan Rules of Professional Conduct consistent with the practical considerations of managing a law office in the new millennium. R-19 concludes that, generally, the file belongs to the lawyer, the client is entitled only to access to the information in the file, and the expense of that access (including copies) should be paid by the client.

None of this changes any decided law or Formal Ethics Opinions approved by the State Bar of Michigan Board of Bar Commissioners. The Ethics Committee does not have the power to do that. R-19 does give guidance as to how to answer these difficult questions until a more definitive answer is given by the Michigan Supreme Court.

The Ownership of Lawyer or Law Firm File Materials Is a Question of Law, Not Ethics

Unfortunately, several informal opinions by ethics committees of this and other jurisdictions repeat the erroneous legal proposition that the lawyer's or law firm's file "belongs to" and is "the property of" the client.[1] In reality, there is no law in the state of Michigan to support that premise, nor any Michigan law directly on point.

Michigan case law regarding records and other professional relationships (*e.g.*, doctor-patient, accountant-client) distinguishes between the "ownership" of physical materials composing the actual records, and the "right of access to information" contained in those records. For instance, as to a patient's Michigan medical records, it is invariably concluded that the physical record itself belongs to the health care provider and the patient is entitled to have only the information in those records made available for copying or inspection.[2] The same is true as to the client records of a Michigan accountant.[3]

Formal Ethics Opinion R-19 is in accord with the majority of U.S. jurisdictions, and the proposed *Restatement of the Law Governing Lawyers*,[4] in recognizing the client's right as one of access to information, not one of custodial ownership. Even the client's right of access is further limited by the lawyer's right to assert a valid lien,[5] or by the duty to withhold information imposed by a countervailing legal obligation.[6]

Moreover, Michigan Formal Ethics Opinions R-5 and R-12 are consistent in their view that the ownership of the representation file is a matter of law, not ethics; neither of those formal opinions conclude that the file "belongs to" or is "the property of" the client. To the extent that the informal opinions of the Ethics Committee have

"Focus on Professional Responsibility" is presented as a monthly feature to address ethics, professionalism, and other regulatory issues affecting Michigan lawyers.

**The author acknowledges and appreciates all of the outstanding work and research by the Ethics Committee on this issue, especially by United States Magistrate Judge Virginia M. Morgan and Terry R. Bacon.*

previously been based upon an erroneous legal proposition concluding global proprietary file ownership by the client, those informal opinions should be ignored.[7]

A Lawyer's Files Are Owned by the Lawyer or by the Law Firm Maintaining Them

The ownership of the physical materials composing the file is to be distinguished from access to the information contained in them. While the physical record itself belongs to the lawyer or the law firm, the client is entitled to have access to that information made available for copying or inspection.

This distinction between ownership and access is consistent with the prevailing law of agency and fiduciary duty.[8]

It Is the Lawyer or Law Firm Which is Entitled to the Original, Physical Material in the File, Unless the Client Has a Special Need or a Pre-existing Proprietary Right in the Original

A file record maintained electronically on computer hard disk or tape, or upon magnetic tape, microfiche, or microfilm need not be delivered to the client; the client is entitled only to access to the information contained on the physical media, NOT the "original" (which belongs to the lawyer). See Formal Opinions R-5 and R-12.

File materials maintained on paper may be delivered to the client by means of photocopy or electronic format, so long as the information is legible and usable to the client.

Those parts of files assembled by the lawyer for the representation of a client "belong" to the lawyer or law firm; this includes attorney work product. The client may be entitled to the information contained in the attorney work product document if a reasonable need is shown.

No Michigan law exists regarding the client's right to work product, such as the contents of research or other internal memoranda, which, in the majority of jurisdictions,[9] may be withheld from the client if it concerns "internal" issues (such as staff assignments, client misconduct, possible malpractice). A minority give the client access only to the end product.[10]

On the other hand, the client is entitled to the original if the client has a pre-existing proprietary right in the record, or the document has intrinsic value. For instance, if the client provided a business record, ledger, tape, computer media, or other such document to the lawyer, then this actual, physical property (the original) should be returned to the client; the lawyer may retain a copy, whether or not the client consents. This same exception would also include documents that have intrinsic value, such as the original of a will, promissory note, bond, stock, certificate of title, evidence of ownership, or other operative documents. In these instances, the intended purpose of the document requires the original; the document has intrinsic value, over and above the information contained within it.

Sometimes the original of the document may also be necessary in order for full use to be made of it. Examples would include a questioned document, when the authenticity of its content or signature cannot be accurately determined without examination of the original. In those instances, access might include at least temporary custody or nondestructive use of the original document, film, tape, or media.

Unless Specifically Agreed or Required by Law, MRPC Does Not Require That the Client Be Provided with the "Internal Records" of the Lawyer or Law Firm

Internal records would include accounting ledgers, checking account records, and "draft" statements or bills, as well as time records for lawyer's work.

A client may be entitled to copies of or access to such internal records, if the entitlement arose by contract, through the terms of engagement or fee agreement, through discovery in litigation, or volunteered by the lawyer or firm, but MRPC does not require this. Generally, ownership and access to these internal records is exclusively in the lawyer or firm.[11]

Notwithstanding the above general principle, as to trust funds or property belonging to another, MRPC 1.15(a) requires that the lawyer maintain "complete records," and MRPC 1.15(c) does require that the client be given an "accounting" of the receipt and disbursement;[12] nevertheless, this does not require providing the client with the original, internal record of the trust account. Rather, the client is entitled to the information on those records, as it pertains to an accounting of trust funds or property related to that client.

Since the Client's Right Is One of "Access" (Not Custody or Possession), It Is the Client Who Should Bear the Cost of Copying and Delivering Copies of the File Records

The proposition that the lawyer should bear the cost of copying is merely a misguided consequence of the erroneous conclusion that the file is the property of the client; there is no independent basis for this proposition anywhere in MRPC or other law. Previous informal opinions [RI-203 (3/29/94); CI-845, (11/1/82) and CI-926, (5/12/83)] (which shifted the copying charges to the lawyer) are incorrect.

The client may be given access for inspection and copying, but that does not include also being given a physical or electronic copy of the material. The cost of making that physical or electronic copy, and the delivery of it, could be substantial, and should be born by the client.

However, when the client does maintain a proprietary interest in specific file material, then it is the lawyer who should bear the cost of copying, if the lawyer wishes to retain a physical or electronic copy of the record.

Required Document Retention/ Destruction Practices Pertain Only to Client Property, or to Documents for which a Client Would Likely Demonstrate a Need

Formal Opinion R-12 supports an interpretation of Formal Opinion R-5 as having established the lawyer's duty to have in place a "plan or procedure" governing safekeeping and disposition of "client property," including those parts of the representation file that belong to the client or for which the client has a need.[13] Such items include those furnished to the lawyer by or on behalf of the client, the return of which could reasonably be expected by the client, and original operative documents or those having intrinsic value (*e.g.*, contract, promissory note, will), especially when not filed or recorded in public records.

As stated by Formal Opinion R-12, if the "original file" does not include documents owned by the client, or if the file contains only documents that are available from the public record, then the client's interests are reasonably protected by a microfilm, or other electronic copy; the lawyer need not obtain client consent or input before destroying a paper file that is subsequently maintained on microfilm or electronic media.

There is the risk that the client may have a "need" for the original document, tape, or other media. Thus, the destruction of the original file without the client's consent does present some risk to the lawyer or law firm. For this reason, some lawyers and law firms make a judgment about the reasonable time period in which such a need might materialize, and designate that time period as the reasonable time that the paper file will be maintained, after which it may be destroyed. For records of funds or property held in trust, the minimum record retention period is five years after the termination of the representation. MRPC 1.15(a). For other records, it is discretionary and should be part of the "plan or procedure" required by Formal Opinion R-5.

It Is Recommended (But Not Required) That Issues Relating to File Ownership and Access, Copy Charges for Information Requests, and File Destruction Practices, Be Described by the Lawyer to the Client in the Terms of Engagement or Some Other Appropriate Disclosure

Until the Michigan Supreme Court does something different, most of these issues can be resolved by an agreement between the lawyer and client contained in the

Sample Engagement Provision Re: Representation Files

Once our engagement in this matter ends, we will return the file materials provided by you upon your request. You agree that we may retain, at your expense, copies of the file materials. You also agree that any materials left with us after the engagement ends may be retained or destroyed, at our discretion. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request documents from us, copies that we generate will also be made at your expense.

Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, credit and account records, and internal lawyers' work product (such as drafts, notes, internal memoranda, legal research, and factual research, including investigative reports prepared by or for the internal use of lawyers). Any documents that are retained by the firm will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.

John W. Allen is a partner with Varnum, Riddering, Schmidt & Howlett, LLP, in Kalamazoo. He is currently chairperson of the Standing Committee on Professional and Judicial Ethics (the Ethics Committee) of the State Bar of Michigan.

terms of engagement. A sample engagement provision in a client retainer agreement is as follows:

Footnotes

1. Examples include Michigan Informal Ethics Opinions (under the Michigan Rules of Professional Conduct) RI-62 (10/10/90); RI-86 (5/22/91); and RI-100 (9/30/91). Similarly confusing statements were made in Michigan Informal Ethics Opinions under the former Michigan Code of Professional Responsibility CI-845; and CI-926.
2. *McGarry v J A Mercier Co,* 272 Mich 501, 503; 262 NW 296.297 (1935). Also Michigan Opinion of the Attorney General (OAG) 1978, No. 5125, p 454 (5/30/78), which says: "The *ownership of the physical materials composing the actual records* is to be distinguished from the information contained therein. While *the physical record itself belongs to the health care provider,* the patient is entitled to have that information made available to him for copying or inspection . . ." (Emphasis added.)
3. Pursuant to MCL 339.714, working papers, memoranda, and similar documents made by a CPA or employee of a CPA "remain the property of the certified public accountant unless there is an agreement to the contrary."
4. See *Restatement,* § 58 (Proposed Final Draft No. 1, March 29, 1996).
5. A good summary of attorneys' liens can be found in *Clarifying Liens,* 73 MBJ 690 (July, 1994); nevertheless, a client's good faith need for the information could trump the lawyer's right to a lien.
6. As summarized in the *Restatement of the Law Governing Lawyers* (Proposed Final Draft No. 1, March 29, 1996), § 58, Comment C:

   A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another (see Restatement, Second, Agency § 381). That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime (see § 32). Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

   Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report (see § 31, Comments c & d; § 35, Comment c). Ordinarily, however, what will be useful to the client is for the client to decide.
7. Michigan Informal Ethics Opinions are prepared and issued by a subcommittee after being circulated to subcommittee members and the chairperson has resolved any conflicting views. Informal opinions generally deal with situations of limited and individual interest or application. Informal opinions bear the designation "RI" for "informal" and the opinion number. Formal Ethics Opinions are those adopted by the Board of Commissioners, and reflect the policy of the State Bar. They bear an "R" designation. Neither Formal nor Informal Ethics Opinions have the force and effect of law, and neither may be used as an absolute defense to a charge of ethical misconduct. Rules of the Ethics Committee, R-7-B and 8.
8. See *Restatement* (Proposed Draft No. 1, March 29, 1996), § 58, Comment c, citing *Restatement,* Second *Trusts,* § 173 and *Restatement,* Second, *Agency,* § 381.
9. See, *e.g., Sage Realty Corp v Proskauer,* 91 NY2d 30, 689 NE2d 879 (1997); *Resolution Trust Corp v H, PC,* 128 FRD 647 (ND Tex 1989); *Maleski v Corporate Life Ins Co,* 163 Pa Commw 36, 641 A2d 1 (1994); *Matter of Kaleidoscope, Inc,* 15 Bankr 232 (Bankr ND Ga 1981), *rev'd on other grounds,* 25 Bankr 729 (ND Ga 1982); Colo Bar Ass'n Ethics Comm Op 104 (April 17, 1999); Connecticut Bar Ass'n Comm on Professional Ethics, Op 94-1 (1994); Ohio Sup Cr Bd of Commr's on Grievances and Discipline, Op 92-8 (April 10, 1992); State Bd of Cal Standing Comm on Professional Responsibility and Conduct, Formal Op 1992-127 (1992); Oregon State Bar Ass'n, Formal Op 1991-125 (1991); and State Bar of Ga Formal Advisory Op 87-5.
10. Under the so-called "end product" theory, the end product of the lawyer's work (the pleading, contract, *etc.*) belongs to the client, but the lawyer owns the work product containing his mental impressions, research, analysis, *etc.* (*i.e.,* his notes, research memoranda, *etc.*) See *Federal Land Bank v Federal Intermediate Credit Bank,* 127 FRD 473, *modified,* 128 FRD 182 (SD Miss 1989); *Corrigan v Armstrong, Teasdale, Schlafly, Davis & Dicus,* 824 SW2d 92 (Mo App 1992); Alabama State Bar, Formal Op RO-86-02 (Dec 23, 1987); Arizona State Bar Comm on Rules of Professional Conduct, Op 92-1 (March 12, 1992); Illinois State Bar Ass'n, Op 94-13 (Jan 1994); North Carolina State Bar Ethics Com RPC 178 (April 14, 1994); Rhode Is Sup Ct Ethics Advisory Panel, Op 92-88 (1993); Iowa Supreme Ct Board of Prof'l Ethics and Conduct Op 82-23 (Dec 6, 1982).
11. See *Restatement* (Proposed Final Draft No. 1, March 29, 1996), § 58, Comment c:

    A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery or the document when discovery rules so provide.
12. The requirements for Michigan lawyer trust accounts are summarized in Formal Ethics Opinion R-7 (April 27, 1990).
13. See *Record Retention Overview,* 74 MBJ 1196 (November, 1995); and Kerr, *Creating a Record Retention Policy,* 69 MBJ 684 (July, 1990), (which includes a sample policy).